

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN**

MARLA M. BRUEMMER and
DESIGN EVOLUTIONS, INC.,

Plaintiffs,

vs.

Case No. 1:11-cv-988

Hon. Robert Holmes Bell

TOM SCOTT d/b/a T.A. SCOTT
CONSTRUCTION, INC. and
DON CHAPMAN,

Defendants.

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**DEFENDANTS TOM SCOTT D/B/A T.A. SCOTT CONSTRUCTION, INC.'S
AND DON CHAPMAN'S MOTION IN LIMINE TO EXCLUDE PLAINTIFFS'
EXHIBIT: TRANSPARENT OVERLAY DRAWINGS, PURSUANT TO FRE 403**

NOW COMES Defendants Tom Scott d/b/a T.A. Scott Construction, Inc. and Don Chapman, by and through counsel, pursuant to Fed. R. Evid. 403., hereby moves this Court to exclude Plaintiffs' exhibit: Transparent overlay drawings.

1. Pursuant to Local Rule 7.1(d), the Defendants counsel has communicated with the Plaintiff's counsel as to the nature of this motion. Plaintiff's do not consent to the exclusion of the exhibits.

2. Pursuant to Fed. R. Evid. 403, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issue, *misleading the jury*, undue delay, wasting time, or needlessly presenting cumulative evidence”.

3. Plaintiff’s entered exhibits as: Exhibit 2A, 4A, 6A, 8A, 10A, and 12A, in Plaintiff’s Brief in Opposition to Defendants’ Motion for Summary Judgment, Document #56 of the Pleadings (herein after referred to as; “Exhibits of Doc. #56”).

4. Plaintiff’s “Exhibits of Doc. #56” are a combination of the Plaintiff’s and the Defendants’ drawings, where the Plaintiff’s drawings are placed over top on the Defendants.

5. Plaintiff’s “Exhibits of Doc. #56” are manufactured in such a way that the drawings are; muddled, indistinguishable, over-shadowing, and are highly likely to create confusion.

6. Pursuant to Fed. R. Evid. 403, the Court may exclude evidence that the Court finds could mislead a jury. “Exhibits of Doc. #56” are highly likely to be confusing and misleading to a jury.

WHEREFORE, Defendants, Tom Scott d/b/a T.A. Scott Construction, Inc. and Don Chapman respectfully request that the Court grant Defendant’s Motion in Limine to exclude the evidence as referred to as “Exhibits of Doc.#56”.

WILLIS LAW

Dated: January 24, 2013

By: /s/ Shaun Patrick Willis

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SOUTHERN DIVISION**

MARLA M. BRUEMMER and
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**MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE
EVIDENCE: TRANSPARENT OVERLAY DRAWINGS, PURSUANT TO
FRE 403**

Defendants Tom Scott d/b/a T.A. Scott Construction, Inc., and Don Chapman, move for the court to exclude evidence ("Exhibits of Doc. #56") of blue print elevation drawings with transparent overlays that contain different sets of elevation drawing.

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Facts:

Defendants and Plaintiff each have submitted numerous elevation drawings, sketches, and blue print like documents. "Exhibits of Doc. #56" consists of transparent plastic with plaintiff's design. Each drawing lays over the Defendant's blue print style drawings. The Plaintiff's drawings are thick, heavy, and boldly lined drawings. The Defendant's blue print style drawings are more finely printed.

The intended concept is to be able to directly compare the visual difference of the two drawings by laying one set of drawing over the other. When the Plaintiff's transparent overlay is set on the Defendant's blue print style drawings the overlay becomes very prominent, and muddles and over-shadows the drawing underneath, making it difficult to make any comparison of the two drawings. By way of example, when the overlay drawings were shown to Mr. Reardon, the homeowner, he stated, "[m]y eyes are spinning in circles here with all of these lines" (Michael Reardon Dep., 32:2 – 45:15,). If the homeowner was confused or mislead by the exhibits, then the exhibits are going to, with a high likelihood, cause confusion to a lay juror who has no previous knowledge of the home or the drawings.

Law:

Rule 403 of the Federal Rules of Evidence states; "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, *confusing the issues, misleading the jury,*

undue delay, wasting time, or needlessly presenting cumulative evidence. (emphasis added) Fed. R. Evid. 403. The Court of Appeals in *In re Air Crash Disaster* held that, the exclusion of a different, newer model flight control than the model that was involved in the incident was permissible and within the trial court's discretion. *In re Air Crash Disaster*, 86 F.3d 498, 531 (6th Cir. 1996) The Court held, "[t]he exhibits would have complicated the proceedings, and could easily have confused the jury". *Id* at 531.

Legal Argument:

The issue is whether the overlay drawing could be confusing and misleading to a jury. The facts show that because of the way the transparent overlay drawing is composed of thick, heavy, and bold lines, it makes it very difficult, if not nearly impossible, to distinguish the blueprint style drawing when laid over top. If the blueprint style drawing is not distinguishable, then no conclusion of any similarities or differences between the two drawings can be made. If differences between the drawings cannot be made then it would be reasonable to expect that a jury could be misled or confused by the overlay drawing. Not only is it reasonable to expect a jury to be misled and confused, it is highly likely because Mr. Reardon, the homeowner, was confused and had a very difficult time distinguishing the differences when shown the overlay drawings. If the homeowner, someone with arguably the most knowledge of the actual differences in the drawing, was misled and confused then it would be reasonable to expect a jury, comprised of lay people with no knowledge of the design or

construction, to be mislead and confused by the thick, heavy, and bold nature of the transparent drawings.

Rule 403 states that the court has discretion to exclude evidence that could mislead or confuse a jury. Fed. R. Evid. 403. Here, the overlay drawing's probative value should be outweighed by the misleading and confusing nature. In light of the fact that many other exhibits exist and have been submitted, a side-by-side comparison rather than transparency items show more accurate differences in the parties' drawings. A side-by-side comparison allows the jury to make their own conclusion without the risk of interference by only seeing thick, bold, and overshadowing drawing that creates the confusion and misleading nature at hand.

Conclusion:

The overlay drawings should not be used to portray the differences between the parties two drawings. The overlay drawings have been considered to be misleading and confusing by a person with thorough knowledge of them, Michael Reardon. The overlay drawings are misleading and highly likely to confuse to a jury. There are several other exhibits available that are not likely to cause confusion or be misleading; therefore the probative value of the evidence is slight at best with a *very high* likelihood of confusion and misleading a jury. The court has discretion to exclude such evidence and in the instant circumstances dictate such an exclusion.

WHEREFORE, the Defendants respectfully request that;

1. Evidence of the overlay drawings ("Exhibits of Doc. #56"), attached, be excluded from use in trial for the purpose of attempting to distinguish or exemplify the differences between Plaintiff's and Defendant's drawings.

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Dated: January 24, 2013

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